

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

DEC 20 1994

FCC MAIL ROOM

In the Matter of )

Amendment of Section 73.202 )

FM Table of Assignments )

(Colonial Heights, Tennessee) )

MM Docket No. 93-28

RM-8172

RM-8299

DOCKET FILE COPY ORIGINAL

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Murray Communications ("Murray"), permittee (File No. BPH-900220MM) of WLJQ(FM), Colonial Heights, Tennessee, by counsel herewith submits its Petition for Reconsideration of the Commission's Report and Order (DA-1242), 59 FR 60077 (November 22, 1994) (the "Report and Order") <sup>1</sup>/ in the above referenced proceeding, seeking reconsideration in part of the Commission's action reflected therein. <sup>2</sup>/ In support whereof the following is shown:

1. This Petition is being filed within 30 days of publication in the Federal Register in accordance with the provisions of Sections 1.4(b)(1) and 1.429(d) of the Rules.

2. Murray does not object to or seek reconsideration with respect to the Commission's action in substituting 290C3 for 290A at Colonial Heights, Tennessee, and modifying WLJQ(FM)'s construction permit to specify operation on 290C3 and intends to implement that change in accordance with paragraph 5 of the Commission's Report and Order. Murray seeks reconsideration only with respect to the Commission's dismissal of and failure to implement the proposal advanced in its Counterproposal.

No. of Copies rec'd  
List A B C D E

024

1. As reflected in the Report and Order, Murray filed a timely Counterproposal, proposing the substitution of Channel 240C2 for 290A at Colonial Heights, Tennessee, as well as the substitution of Channel 290A for 231A at Tazewell, Tennessee, and Channel 231A for 240A at Morristown, Tennessee, which were necessary to accomodate the upgrade to 240C2 at Colonial Heights, Tennessee. Murray demonstrated in its Counterproposal that the required substitutions at Tazewell and Morristown, Tennessee, were "incompatible swaps," as that term has come to be used to denote the kind of mutually exclusive channel substitutions envisioned by the Commission in Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, 120, at para. 24. (1986). See: Murray Counterproposal, Technical Statement at pp. 2-4.

2. As reflected in the Report and Order, after having twice given public notice of the filing of Murray's Counterproposal and having received no timely comments thereon, the Commission issued an Order to Show Cause (DA 93-122), released November 2, 1993, 8 FCC Rcd. 7901 (1993). In the Order to Show Cause the Commission indicated its determination that the proposal advanced in Murray's Counterproposal complied with the Commission's rules and policies, as well as its preliminary determination that the proposal would serve the public interest, and directed the licensees of WCTU-FM, Tazewell and WMXK-FM, Morristown, Tennessee, to show cause why their licenses should not be modified as proposed. The licensee of WCTU-FM, Tazewell,

Tennessee, failed to respond to the Order to Show Cause. While the licensee of WMXK-FM did respond, stating its opposition to the substitution of Channel 231A for 240A at Morristown, Tennessee, its opposition was premised solely upon concerns relating to its private economic interests, not upon any public interest basis. See: Murray's Reply to Response to Order to Show Cause.

3. In its Report and Order the Commission inexplicably reversed its prior determination that Murray's proposal complied with its rules and policies and its preliminary determination that it would serve the public interest and dismissed Murray's Counterproposal solely on the basis of its conclusion that it "does not constitute an incompatible channel swap." As will be demonstrated below, this determination was both unsupported and erroneous and the Commission's action, dismissing Murray's Counterproposal, was arbitrary, capricious and contrary to law.

4. In concluding that the proposal advanced in Murray's Counterproposal did not constitute "an incompatible channel swap" the Commission relied solely upon its contention that Murray "does not propose to swap its current operating channel with another authorized facility but rather proposes a number of channel substitutions plus one station moving its transmitter site in order to accomodate petitioner's upgrade." This contention was factually erroneous and entirely illogical in light of Murray's unambiguous proposal to implement the 240C2 upgrade at Colonial Heights by substituting Channel 290A, "its

current operating channel," for Channel 230A, utilized by WCTU-FM at Tazewell, Tennessee, "another authorized facility," while substituting WCTU-FM's "current operating channel" for Channel 240A at Morristown, Tennessee, which is currently utilized by WMXK-FM, also "another authorized facility."

5. Initially, it must be noted that the term "incompatible channel swap" appears nowhere in the Commission's Report and Order in Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114 (1986). Instead, in adopting Section 1.420(g)(3) the Commission indicated that it would consider for implementation under the rule substitutions other than co-channel and adjacent channel substitutions, which involved a "similar" "mutually exclusive relationship." Id. at 120, para. 24.

6. In addressing these "mutually exclusive" channel substitutions, the Commission focused on the "rationale" for the new rule, i.e., that the channel proposed to be utilized to implement the upgrade "is not available in the Ashbacker sense for application by other interested parties." 60 RR2d at 120, para. 24. Thus, the Commission recognized that other channel substitutions could involve "mutually exclusive" relationships which were "similar to" the mutually exclusive co-channel and adjacent channel substitutions addressed under the rule. Id. Accordingly, the Commission proposed to address "variations of the rule which involve the need to make substitutions in other communities in order to create the mutually exclusive

relationship" by considering on a case by case basis "whether the rationale used here for the new rule applies" to the factual situation presented in each case, indicating that the "concern in all such cases would be the mutually exclusive relationship which is created." 60 RR2d at 120, para. 24.

7. Since adopting Section 1.420(g)(3) in 1986 the Commission has done precisely that, focusing solely upon the existence of a "mutually exclusive relationship," where nonadjacent channel substitutions are proposed. Where a mutually exclusive relationship has been found to exist among the channels proposed for substitution, the Commission has approved the proposed substitutions. <sup>3</sup>/ Where the required mutually exclusive relationship has been found to be lacking, the Commission has refused to approve the proposed substitutions. <sup>4</sup>/

8. Thus, in Blair, Nebraska, MM Docket No. 92-155, 8 FCC Rcd. 4086 (1993) the Commission rejected a proposal where (a) the party seeking the nonadjacent upgrade did not propose to substitute its current channel for that of another authorized

---

3. See, e.g.: Hazlehurst, Mississippi, MM Docket No. 93-158, released November 3, 1994; Caldwell, Texas, MM Docket No. 91-58, 9 FCC Rcd. 4425 (1994); Beverly Hills, Florida, MM Docket No. 92-195, 8 FCC Rcd. 2197 (1993); Cordova, Alabama, MM Docket No. 90-476, 7 FCC Rcd. 5489 (1992); Perry, Florida, MM Docket No. 87-455, 7 FCC Rcd. 2557 (1992); Pikeville, Kentucky, MM Docket No. 90-213, 6 FCC Rcd. 3732 (1991); Angola, Indiana, MM Docket No. 88-284, 6 FCC Rcd. 1230 (1991)

4. See, e.g.: Blair, Nebraska, MM Docket No. 92-155, 8 FCC Rcd. 4086 (1993); St. James, Minnesota, MM Docket No. 86-491, 4 FCC Rcd. 5652 (1989); Dyersburg, Tennessee, MM Docket No. 87-563, 4 FCC Rcd. 4814 (1989)

facility, but instead proposed to make it available as a new allotment, and (b) the proposed allotment was not the only channel available for allotment to the community. In Dyersburg, Tennessee, MM Docket No. 87-563, 4 FCC Rcd. 4814 (1989) the Commission observed (at para. 16) that "the underlying rationale for the adjacent channel upgrade procedure is the recognition that only the petitioner can use the proposed channel and, therefore, it would only unnecessarily place the existing station's authorization at risk to entertain competing applications for the proposed allotment." Id. at para. 16. Noting the absence of the required mutually exclusive relationship among the channel substitutions proposed in that case, the Commission refused to implement the proposal pursuant to Section 1.420(g)(3):

However, where, as here, some other Class A channel is available for substitution at community Y, the continued operation of the existing station in community X is not incompatible with the higher class allotment to community X. Id. at para. 16.

Likewise, in St. James, Minnesota, MM Docket No. 86-491, 4 FCC Rcd. 5652 (1989) the Commission found the required mutually exclusive relationship lacking where the proposed nonadjacent upgrade was not precluded by the continued operation of any other existing station on its current channel. Thus, in each instance where the Commission has rejected a request to approve nonadjacent channel substitutions pursuant to Section 1.420(g)(3), it has done so solely on the basis that the required

mutually exclusive relationship was lacking.

9. In the Report and Order the Commission's Staff applied the requirements for implementation of nonadjacent upgrades pursuant to Section 1.420(g)(3) in an unintended and unduly restrictive manner. Nothing in Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114 (1986) indicated any intention to limit consideration only to those proposed channel substitutions which fit precisely the facts of the example discussed at paragraph 24. Nor did the Commission limit the proposals to be considered to one for one channel exchanges between two and only two stations. On the contrary, the Commission indicated unambiguously that requests would be reviewed on a case by case basis with the guiding principle in each instance being, not whether the proposal involved a channel "swap" between two and only two stations, but whether "the mutually exclusive relationship of the channels involved is similar to the subject proposal" and "the rationale used here for the new rule applies." 60 RR2d 114, 120, para. 24. Indeed, this principle has consistently been applied by the Commission and its Staff in all cases prior to the adoption of the Report and Order in this proceeding.

10. In Angola, Indiana, MM Docket No.88-284, 6 FCC Rcd. 1230 (1991) the Commission addressed an almost identical upgrade proposal, involving mutually exclusive channel substitutions among three existing stations. Obviously, these three interlocking substitutions did not fit the precise facts of the

example set forth at paragraph 24 of Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, 120 (1986), nor were they limited to a one for one channel exchange between two and only two stations. Yet, the proposed substitutions were approved pursuant to Section 1.420(g)(3), consistent with Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, at para. 24, which did not limit consideration of nonadjacent channel substitutions either (a) to those precisely fitting the facts of the example set forth in paragraph 24 or (b) to those involving a one for one exchange between two (and only two) stations. Furthermore, the Commission not only recognized the mutually exclusive relationship of the substitutions proposed in Angola, Indiana, and approved their implementation under 1.420(g)(3) of its Rules, it also explicitly confirmed [at Note 18] that "the proposal constitutes an 'incompatible channel swap'," citing Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, 120 (1986), leaving no question regarding the proper interpretation and application of that term.

11. As indicated above, the mutually exclusive channel substitutions addressed in Angola, Indiana, MM Docket No.88-284, 6 FCC Rcd. 1230 (1991) were almost identical to the substitutions proposed by Murray in the instant case. There, the Commission



approved the substitution of:

286B1 for 224A at Decatur, Indiana  
224A for 230A at Berne, Indiana  
231A for 286A at Roanoake, Indiana

as an "incompatible channel swap," where, here, the Commission refused to substitute:

240C2 for 290A at Colonial Heights, TN  
290A for 231A at Tazewell, TN  
231A for 240A at Morristown, TN

on the basis that the proposal did not involve a channel "swap" between Colonial Heights and "another authorized facility." Obviously, the "factual situation" in the instant case is identical with that addressed in Angola, Indiana, and the outcome in the instant case is required to be consistent with that in the former. <sup>5</sup>/ Accordingly, the Commission erred in dismissing Murray's Counterproposal and failing to implement the channel substitutions proposed therein.

12. The instant case also may not be distinguished from Angola, Indiana, and other cases where nonadjacent channel substitutions have been approved pursuant to 1.420(g)(3) on the basis that an additional substitution was required at Whitley

---

5. The factual situations of the two cases are identical with the minor exception that in Angola, Indiana, the substitution proposed for Roanoake was not of the current channel at Berne, but the first adjacent channel to the current channel at Berne. However, this minor distinction simply compels the conclusion that the proposal advanced by Murray involves a greater degree of mutual exclusivity than that addressed in Angola, Indiana, which the Commission approved.

City, Kentucky and a site restriction required with respect to WAEY(FM), Princeton, West Virginia, inasmuch, as the Commission acknowledged, both stations have consented to those substitutions and restrictions. Report and Order at Note 3. Furthermore, the Commission has previously approved mutually exclusive channel substitutions in situations where other, additional substitutions were required to implement the mutually exclusive substitutions. See, e.g.: Hazlehurst, Mississippi, MM Docket No. 93-158, released November 3, 1994; Beverly Hills, Florida, MM Docket No. 92-195, 8 FCC Rcd. 2197 (1993).

13. Finally, based on established precedent, it was unnecessary for the Commission even to reach the issue of whether the proposal was entitled to be considered under 1.420(g)(3), inasmuch as no competing expressions of interests were timely filed. Thus, as was correctly reflected in the Report and Order in this proceeding, no comments were filed in response to Murray's Counterproposal, despite the fact that it was placed on public notice for comment, not once, but twice (See: Report and Order at Note 2). Accordingly, no competing expressions of interest regarding the use of Channel 240C2 were timely submitted.

14. In Madison, South Dakota, MM Docket No. 93-230, 9 FCC Rcd. 3373 (1994), while noting the petitioners' contention that the proposed channel substitutions involved a mutually exclusive relationship, bringing them within the purview of Section 1.420(g)(3) of the Rules, the Commission indicated that it was

unnecessary to undertake any analysis to determine whether the proposal "qualified as an incompatible swap pursuant to Section 1.420(g)(3) of the Commission Rules in view of the fact that no additional comments were received expressing an interest in the allotment of Channel 291C2 at Slayton." Id. at para. 4. It should also be noted that the contention that a mutually exclusive relationship existed in this case was questionable, given that both stations currently operated on Channel 276A and the proposal did not involve any other proposed substitution involving a mutually exclusive relationship. Yet, the proposal was implemented by the Commission without regard to Section 1.420(g)(3), solely on the basis that no competing expressions of interest were timely submitted during the comment period.

Likewise, in St. Augustine, Florida, MM Docket No. 990-164, 7 FCC Rcd. 4138 (1992) Commission, noting the petitioner's contention that the proposed substitution involved a mutually exclusive relationship, permitting implementation without consideration of competing interests, indicated that "we need not address this issue herein, as no timely expressions of interest" had been filed. Id. at Note 9. As indicated above, no competing expressions of interest were timely filed in this proceeding regarding the use of Channel 240C2 at Colonial Heights, Tennessee, nor did any party challenge Murray's contention that the proposed substitutions at Tazewell and Morristown involved a mutually exclusive relationship. Accordingly, based on established precedent, it was unnecessary for the Commission to

reach the issue and it should have implemented the channel substitutions proposed in Murray's Counterproposal on the basis that no competing expressions of interest were timely filed, regardless of its views on the applicability of 1.420(g)(3).

15. Therefore, it must be concluded that the channel substitutions proposed in Murray's Counterproposal involved the kind of mutually exclusive relationships which are entitled to consideration and implementation pursuant to Section 1.420(g)(3) in accordance with Modification of FM Broadcast Licenses to Higher Class Co-Channels or Adjacent Channels, 60 RR2d 114, 120, at para. 24. (1986). Furthermore, precedent established subsequent to the adoption of Section 1.420(g)(3) demonstrates that the mutually exclusive channel substitutions advanced in Murray's Counterproposal are precisely the kind nonadjacent channel substitutions that the Commission indicated it would implement under Section 1.420(g)(3) as involving mutually exclusive relationships "similar" to those involved in co-channel and adjacent channel upgrades. Accordingly, the Commission erred in dismissing and in failing to implement Murray's Counterproposal and its action was unsupported, arbitrary, capricious and unlawful and must be reversed.

WHEREFORE, the Commission should reconsider its action, reinstate Murray's Counterproposal and implement the channel

substitutions proposed therein without further delay.

Respectfully Submitted,

MURRAY COMMUNICATIONS

By:

  
Timothy K. Brady  
Its Attorney

P.O. Box 986  
Brentwood, TN 37027-0986  
(615) 371-9367  
December 20, 1994

CERTIFICATE OF SERVICE

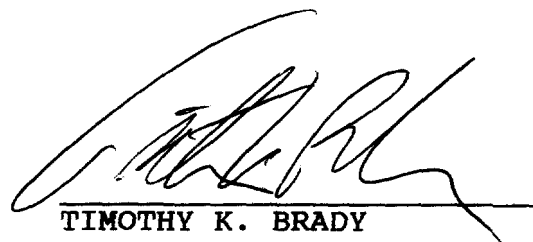
I, Timothy K. Brady, hereby certify that on or before the <sup>John</sup> day of December, 1994, I will have served a copy of the foregoing Petition for Reconsideration by First Class US Mail, postage prepaid, upon the following:

Michael Norton, Esq.  
Wyatt, Tarrant, Et. Al.  
1500 Nashville City Center  
Nashville, TN 37219  
(Counsel for Franklin Communications, Inc.)

WFSM, Inc.  
P.O. Box 1409  
Lafollette, TN 37766

Tim Lavender  
WHAY(FM)  
P.O. Box 69  
Whitley City, KY 42653

Henry Beam, President  
Betap Broadcasting, Inc.  
P.O. Box 5588  
Princeton, WV 24740



TIMOTHY K. BRADY